UNREPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **CS (OS) No. 1937/1995**

Date of Decision : September 07 , 2007

#EN ENGINEERS CONSORTIUM PVT. LTD. ..... Plaintiff
! Through: Mr. Ashim Vachher, Advocates

Versus

$ THE ASIAN POWER COMPANY & ORS. ..... Defendants
^ Through: Mr. Rakesh Aggarwal for defendant No. 1

CORAM:-
*** HON'BLE MR. JUSTICE S.N. AGGARWAL**

1. Whether reporters of Local paper may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

S.N.AGGARWAL, J

*

The plaintiff has filed this suit for recovery of Rs. 32,92,00,000/- with pendente lite and future interest @ 24% per annum against the defendants.

2 The brief facts of the case are as follows:-

The plaintiff is a company incorporated under the

Companies Act, 1956 and was at the relevant time engaged in the business of providing various consultancy services in the power sector to the Indian and overseas developers, investors and financial institutions in the matter relating to execution of various power projects.

3 The defendant No. 1 is an overseas company incorporated under the Laws of America. Defendants No. 2 & 3 are stated to be the subsidiaries of defendant No. 1 company. The defendant No. 1 company had entered into an agreement with the State of Karnataka in or around 1992 for construction of Almati Dam in the State of Karnataka and had also undertaken the work of development of three small hydro power projects in Karnataka. After negotiations, the defendant No. 1 had engaged the services of the plaintiff company for monitoring the development and construction work of Almati Dam and also to prepare the pre-feasibility reports in relation to three small hydro power projects at a retainership of 2,250 US Dollars per month excluding the actual expenses to be incurred by the plaintiff on journey from time to time. The terms and conditions of contract between the

parties are contained in the letter of defendant No. 1 dated 14.11.1992 to which schedule of payment was also annexed. The petitioner was paid Rs. 50,000/- by defendant No. 1 as advance towards expenses while entering into the consultancy agreement on 14.11.1992. In terms of letter of appointment dated 14.11.1992, the appointment of the plaintiff company as 'observer/consultant' for defendant No. 1 was to be effective from 01.09.1992. Mr. Harry Davitian and Mr. R.J. Redmore were the President and the Vice President respectively of defendant No. 1 company at the time of appointment of the plaintiff as its 'observer'. The case of the plaintiff is that defendant No. 1 company has not paid any retainership fee despite various letters/reminders sent to it and the only payment made by defendant No. 1 company was on account of actual expenses. The plaintiff company is stated to had sent its bills to defendant No. 1 from time to time on account of retainership fee at rates mentioned in the schedule of payment annexed with the appointment letter dated 14.11.1992. The plaintiff at last had sent a legal notice dated 07.12.1994 calling upon defendant No. 1 to pay the arrears of its retainership fee for

the period starting from 01.09.1992 amounting to 76,545 US Dollars. The defendant No. 1 gave reply to this legal notice which is dated 06.01.1995. In its reply the defendant No. 1 admitted its liability to pay the retainership fee and regretted the delay caused in making the payment to the plaintiff company. The defendant No. 1 vide its aforementioned reply informed the plaintiff that it would sort out the matter relating to payment shortly. The plaintiff gave rejoinder dated 05.02.1995 to the above reply of defendant No. 1 and made its stand clear to defendant No. 1. As the amount of retainership fee claimed by the plaintiff from defendant No. 1 was not paid, the plaintiff has filed the present suit for recovery against the defendants.

4 The defendants have filed their separate written statements in the case. Defendants No. 2 and 3 who are alleged to be the subsidiaries of defendant No. 1 company have denied their liability to pay the suit amount inter alia on the ground that there was no privity of contract between the plaintiff and defendants No. 2 & 3 and on merits they have contended that they are otherwise not liable to pay any amount to the plaintiff

company because they did not avail any consultancy services from the plaintiff at any point of time.

5 The defendant No. 1 in its written statement has taken a two fold defence to the claim of the plaintiff in the present suit. The first defence of defendant No. 1 is that the terms and conditions of appointment contained in the appointment letter dated 14.11.1992 are not binding upon defendant No. 1 company because Mr. R.J. Redmore who had issued the said appointment letter was not competent to appoint the plaintiff company as a 'consultant/observer' of defendant No. 1 for its Almati Dam project in the state of Karnataka. The contention of defendant No. 1 is that Mr. R.J. Redmore had not got the terms and conditions of appointment of the plaintiff company approved from the Board of Directors of defendant No. 1 company. The second defence of defendant No. 1 to the claim of the plaintiff is that the plaintiff company did not work in terms of agreement between the parties and according to defendant No. 1, the plaintiff company at best is entitled to claim retainership fee only for a period of 7 months starting from 01.09.1992. The defendant No. 1 has further

contended that the plaintiff company did not do any work in relation to any of the hydro power projects of defendant No. 1 after February/March, 1993. However, defendant No. 1 has expressed its willingness to pay a reasonable amount to the plaintiff company for the period the said company had worked for it.

6 From the pleadings of the parties following issues were framed by this Court on 23.11.1998:-

1. *Whether there is privity of contract between the plaintiff and defendants No. 2 & 3. If not, to what effect?*

2. *Whether there was a valid agreement between the plaintiff and the defendants for consultancy to be provided by the plaintiff to the defendants?*

3. *Whether the said consultancy agreement was entered upon by an authorised representative of defendant No. 1?*

4. *Whether the plaintiff has rendered service to defendant No. 1 in terms of the agreement between the parties. If so, to what effect?*

5. *To what amount, if any, is the plaintiff entitled and from which of the defendants?*

6. *Whether the plaintiff is entitled to interest. If so, at what rate and for what period?*

7. *Relief.*

7 In evidence the plaintiff company has examined two

witnesses and they are PW-1 Cdr. H.S. Gujral, Managing Director of the plaintiff company and PW-2 K. Venkateshwara Rao, an official from Karnataka Power Corporation. Defendant No. 1 has examined its Vice-President Mr. Byran Somervell Patrick Marra as DW-1. Defendants No. 2 and 3 have not produced any evidence.

8 I have heard the arguments of Mr. Ashim Vachher, learned Advocate who appeared for the plaintiff and Mr. Rakesh Aggarwal, learned Advocate who appeared for defendant No. 1. I have also perused the entire case file with utmost care. My findings on the above issues are as follows:-

ISSUE NO. 1

9 This issue was not pressed by Mr. Vachher appearing on behalf of the plaintiff. He very fairly conceded during arguments that there was no privity of contract between the plaintiff and defendants No. 2 & 3 and therefore he gave up his claim against these defendants. Hence this issue is decided against the plaintiff.

ISSUE NO. 2

10 In June, 1992 defendant No. 1 had taken a project for construction of Almati Dam in the state of Karnataka. Defendant No. 1 is a company incorporated under the American Laws. The case of the plaintiff company is that defendant No. 1 had appointed the plaintiff for monitoring the developments of the Almati Dam project and also for its various hydro power projects to be set up by it in the State of Karnataka. In July and August, 1992, the plaintiff company is stated to had rendered assistance and consultancy to defendant No. 1 in connection with setting up of its hydro power projects in the state of Karnataka. On 28.08.1992, the President of defendant No. 1 company wrote to the plaintiff company appreciating its services and had proposed to engage the plaintiff company as its' consultant'. The letter dated 28.08.1992 written by defendant No. 1 to the plaintiff company is Ex. P-1. In response to letter dated 28.08.1992 (Ex. P-1), the plaintiff company communicated its acceptance to defendant No. 1 vide its letter dated 04.09.1992 (the date wrongly mentioned in the letter as 04.08.1992) agreeing to work as a 'consultant' for defendant No. 1 on payment of consultancy fee @

US $ 3,000 per month. The letter dated 04.09.1992 written by the plaintiff company to defendant No. 1 is Ex. PW1/1. Thereafter, defendant No. 1 company vide its letter dated 14.11.1992 formally appointed the plaintiff company as its 'observer' for the Almati Dam construction at a retainership fee mentioned in the schedule of payment annexed with the said letter. This letter dated 14.11.1992 written by defendant No. 1 to plaintiff company by which the plaintiff company was formally appointed as 'consultant' for defendant No. 1 for its Almati Dam project is Ex. P-2. The schedule of payment is Ex. P-3. The defendant No. 1 admitted the receipt but denied the contents of above referred documents at the time of admission/denial of documents. The plaintiff's witness No. 1 Cdr. H.S. Gujral has very categorically deposed in his testimony that the plaintiff company was appointed as a 'consultant' by defendant No. 1 for its hydro power projects in the state of Karnataka and he has tendered all abovementioned documents Ex.P-1, Ex. P-2, Ex. P-3 and Ex. PW-1/1 in his evidence. There is no rebuttal to the contents of these documents in the cross-examination of this witness. Since

defendant No. 1 has admitted the receipt/dispatch of documents Ex.P-1, Ex. P-2, Ex. P-3 and Ex. PW-1/1 and he has not produced any evidence to the contrary to disprove the contents of the said documents, these documents are deemed to have been proved by the plaintiff. It was held by the Supreme Court in ***Food Corporation of India Vs. Assam State Cooperative Marketing & Consumer Federation Ltd. and Ors. (2004) 12 SCC 360*** that when letters forming part of chain of correspondence and official record tendered in evidence without objection from opposite party and when receipt of the said letters is not disputed by other party, such documents have to be taken as proved and their contents can be read in evidence. A bare perusal of the above referred documents Ex.P-1, Ex. PW-1/1, Ex. P-2 and Ex. P-3 would prove that the plaintiff and defendant No. 1 had entered into a valid agreement for providing consultancy services by the plaintiff to defendant No. 1 in relation to construction of its Almati Dam Project and other small hydro power projects in the state of Karnataka. Accordingly this issue is decided in favour of the plaintiff and against defendant No. 1.

ISSUE NO. 3

11 It is not disputed on behalf of defendant No. 1 that Mr. R.J. Redmore who had issued the letter dated 14.11.1992 (Ex. P-2) appointing the plaintiff company as an 'observer' for defendant No. 1 in relation to its project for construction of Almati Dam in the State of Karnataka was its Vice-President at the relevant time. PW-1 has deposed that he was not aware if the service of Mr. R.J. Redmore were terminated by defendant No. 1 in March, 1993. As per testimony of Cdr. H.S. Gujral, Mr Redmore continued to deal with the plaintiff company on behalf of defendant No. 1 even in 1994.

12 The defendants' witness No. 1 Mr. Byran Somervell Patrick Marra has deposed in his chief that Mr. Redmore was the Vice President of defendant No. 1 company in 1992. He has said that he has found a letter written by Mr. Redmore to Cdr. H.S. Gurjal in regard to his appointment as 'consultant' for defendant No. 1 in September, 1992. According to DW-1 Mr Redmore had no authority to issue the letter dated 14.11.1992 by which the plaintiff was appointed as observer for projects of defendant No. 1.

He has deposed that Mr. Redmore ceased to be the Vice President of TAPCO in late 1992 or early 1993 but he did not give the exact date when Mr. Redmore left the defendant No. 1 company.

13 From the above testimony of the parties, it is evident that Mr. R.J. Redmore was the Vice-President of defendant No. 1 company at the time the plaintiff company was appointed as 'consultant' for defendant No. 1 for its Almati Dam Project in the state of Karnataka. As per testimony of PW-1 Cdr. H.S. Gurjal, Mr. Redmore had been dealing with the plaintiff company even in 1994 and there is no evidence to the contrary either in the cross-examination of PW-1 or in the testimony of DW-1. Defendant No. 1 has not produced any evidence to show that Mr. R.J. Redmore was not authorised to engage the services of plaintiff company in relation to its Almati Dam Project in the state of Karnataka. When it is admitted by defendant No. 1 company that Mr. R.J. Redmore was its Vice-President at the relevant time then I failto understand how it can be said that he did not have the necessary authority to appoint the plaintiff company as a 'consultant/observer' for defendant No. 1 for its Almati Dam

Project. Even if what defendant No. 1 has said is believed to be correct that Mr. Redmore had no authority to appoint the plaintiff company as its 'consultant/observer', still this contention holds no water because an outsider like the plaintiff would not know that Mr. R.J. Redmore did not have the formal approval from the Board of Directors of defendant No. 1 company to appoint the plaintiff company as 'observer/consultant' for defendant No. 1. Once the plaintiff has proved that it was validly appointed by defendant No. 1 as its 'consultant' for Almati Dam Project then onus shifted on defendant No. 1 to disprove the same by leading such evidence as may be available with it. No such evidence has been produced by defendant No. 1 to show that Mr. R.J. Redmore did not possess the necessary authority to appoint the plaintiff company as a 'consultant' for defendant No. 1 for its Almati Dam Project. I therefore hold that consultancy agreement dated 14.11.1992 was entered upon by an authorised representative of defendant No. 1. This issue is accordingly decided in favour of the plaintiff and against defendant No. 1.

ISSUE NO. 4

14 The plaintiff company was appointed as 'consultant/observer' for defendant No. 1 company for its Almati Dam Project in the state of Karnataka vide letter dated 14.11.1992 (Ex. P-2). As per terms of the said consultancy agreement, the responsibilities of plaintiff company as mentioned the above referred letter were as follows:-

> *"Your responsibilities will include detailed monitoring of the construction of the dam, attendance at project review meetings and the preparation of reports for TAPCO on the status of the Dam.*
>
> *You will report the status of the dam construction, the progress made, the quality of work undertaken, anticipated completion date and any scheduled changes or other matters which impact the projected dam completion date of March 1995. You will be responsible to report to the project review meetings which will be held in Bangalore on a regular basis. As an independent consultant, your view should be unbiased and should be reported in a clear and concise format to all the project team members as well as TAPCO."*

15 PW-1 Cdr. H.S. Gujral has deposed in his chief that consequent upon the appointment of the plaintiff as 'observer' for defendant No. 1 in relation to its Almati Dam Project in the state of Karnataka, the plaintiff company started its work of reviewing the construction of the Almati Dam. They used to

attend the project review meetings with the Government of Karnataka on the basis of a letter of authorisation issued by defendant No. 1. The plaintiff company also gave reports regarding the construction of Dam to defendant No. 1 and it had also submitted appreciation reports for three small hydro power projects and pre-feasibility report in respect of one of them. PW-1 has further deposed in his testimony that the plaintiff company had worked for defendant No. 1 till the beginning of 1995 and till that time PW-1 had attended many meetings with the Government Officials along with the defendants. In cross-examination PW-1 has testified that he had visited the Almati Dam site in January/ February, 1993 and had not visited the site of the dam after January/February, 1993 because the defendants had instructed him not to make too many visits at the site so as to minimize the expenses. He however had been attending meetings in Delhi and Bangalore along with the officials of the defendant No. 1. He further denied the suggestion that after March, 1993 PW-1 did not render any services to the defendants.

16 PW-2 K. Venkatashwara Rao is an official from

Karnataka Power Corporation. PW-2 Rao has proved the letter dated 21.02.1994 addressed by Karnataka Power Corporation to PW-1 Cdr. H.S. Gujral. The letter dated 21.02.1994 written by Karnataka Power Corporation to PW-1 Gujral was in relation to a meeting held in Bangalore on 10.01.1994 which was also attended by the representative of defendant No. 1. The said letter dated 21.02.1994 proved by PW-2 is Ex. PW-2/A. PW-2 Mr. Rao has also proved the minutes of the meeting annexed with the letter Ex. PW-2/A and the photocopy of the minutes of the meeting running into 6 pages proved by PW-2 is Ex. PW-2/B. There is nothing in the cross-examination of this witness to have a doubt on his credence. PW-2 is an official witness and there is no reason to doubt his testimony. This witness has proved that PW-1 Cdr. H.S. Gujral, Managing Director of the plaintiff company had attended a meeting in Bangalore on 10.01.1994 in relation to hydro power project as 'observer' of defendant No. 1. PW-2, however, did not know whether Mr. K.M. Shetty representative of defendant No. 1 was also present in the said meeting.

17 Besides the above oral testimony of the parties on

record, the plaintiff has also produced correspondence that was exchanged between the parties from time to time on the subject and the said correspondence tendered in the testimony of PW-1 is in the form of reminders Ex. PW-1/2 to Ex. PW-1/5. The receipt of these reminder letters, sent by the plaintiff company to defendant No. 1, has been admitted by defendant No. 1 during trial of this case. Defendant No. 1 has not produced any evidence to contradict the contents of the said documents and hence the documents Ex. PW-1/2 to Ex. PW-1/5 are taken as proved documents. Admittedly defendant No. 1 did not give any reply to any of the above referred letters and silence on behalf of defendant No. 1 clearly shows that defendant No. 1 had impliedly admitted that the plaintiff company had rendered services to defendant No. 1 in terms of the agreement between the parties. Accordingly this issue is decided in favour of the plaintiff and against defendant No. 1.

ISSUE NO. 5

18 The plaintiff company has successfully proved that it was appointed as a 'consultant/observer' by defendant No. 1 for its

Almati Dam Project in the state of Karnataka. The terms and conditions on which his appointment was made are contained in letter dated 14.11.1992 (Ex-P-2). The appointment of the plaintiff company was to take effect from 01.09.1992. The consultancy charges payable to the plaintiff company for the services rendered by it to defendant No. 1 from time to time were mentioned in the schedule of payment (Ex.P-3) annexed with the letter of appointment dated 14.11.1992. A reference to the schedule of payment (Ex. P-3) would show that defendant No. 1 company had agreed to pay monthly retainership fee to the plaintiff company @ 2,250 US Dollars besides reimbursement of actual expenses to be incurred on travel and lodging etc. There is no dispute between the parties that defendant No. 1 company has not paid any retainership fee to the plaintiff company ever since the date of availing its services till the time the plaintiff company had worked for defendant No. 1 company. Defendant No. 1 company had reimbursed only actual expenses incurred by the plaintiff company from time to time.

19 The question that now arise for consideration is that

till what time the plaintiff company had worked for defendant No. 1 in order to decide his entitlement to claim retainership fee from defendant No. 1. The plaintiff has claimed arrears of retainership fee from defendant No. 1 from September, 1992 to July, 1995. Defendant No. 1 in its written statement has taken a stand that the plaintiff company at best is entitled to claim retainership fee only for the period till February/March, 1993. PW-1 Cdr. H.S. Gujral has deposed in his testimony before the Court that the plaintiff company had worked for defendant No. 1 company till the beginning of 1995. He has not specified the exact period up to which the plaintiff company had worked for defendant No. 1. In order to get the date up to which the plaintiff company may be held entitled to recover retainership fee from defendant No. 1, one may have to look only on the correspondence that exchanged between the parties during the currency of the contract. The plaintiff company had sent various reminders to defendant No. 1 company from time to time and these reminders are Ex. PW-1/2 to Ex. PW-1/5. A perusal of Ex. PW-1/5, receipt of which was admitted on behalf of defendant No. 1, would show that the

plaintiff company had claimed retainership fee from defendant No. 1 company @ 2,250 US Dollars for the period up to 31.10.1994. Defendant No. 1 company did not refute the claim of the plaintiff company contained in the said letter Ex. PW-1/5. Since the retainership fee claimed by the plaintiff company vide its letter Ex.PW-1/5 dated 05.11.1994 was not paid by defendant No. 1 company, the plaintiff company sent a legal notice dated 07.12.1994 (Ex. PW-1/6) to defendant No. 1 company in which it included claim for retainership fee for two more months i.e. for November & December, 1994 and made a total claim of 76,545 US Dollars towards its retainership fee from defendant No. 1 till the date of sending of the said notice. In the said legal notice Ex. PW-1/6, the plaintiff had also detailed out the various works it had done for defendant No. 1 from time to time. Defendant No. 1 for the first time broke its silence and send a reply dated 06.01.1995 to the aforementioned legal notice. The said reply of defendant No. 1 is Ex. P-4 which reads as under:-

January 6, 1995

Cdr. H S Gujral, I.N. (Retd.)

EN Engineers Consortium (P) Ltd.
F-463, Sarita Vihar,
New Delhi—110 004
INDIA

Re : December 7, 1994 letter from Sunil Tayagi, Advocate

Dear Commander Gujral:

We are in receipt of a letter, dated December 7, 1994 from your attorney, Mr.Sunil Tyagi regarding payments which you claim are owned to you by TAPCO.

We regret that there has arisen a misunderstanding on this matter. We have a high regard for you and for your capabilities and we would like to discuss this matter with you so that we can resolve it to our mutual satisfaction. In a recent discussion with Mr.Ashok Mubayi, you offered to provide a detailed accounting of the time and expenses you have incurred on TAPCO's behalf. You also offered to provide the written documentation that you claim establishes your right to certain payments. We would appreciate your providing that information to Mr.Mubayi prior to his leaving for the United States on January 8. If that is not possible, could you please fax that information to my office (fax number: 516 751-2915) no later than Monday, January 9. Following receipt of your information, we will review it and promptly respond to you.

Again, we regret that a misunderstanding has arisen. We are committed to seeking to work this matter out with you and look forward to reviewing the information you have offered to provide.

This letter is sent without prejudice to TAPCO and is not intended to be, at this time, our response to your claim.

Thank you for your cooperation.

Sincerely,

Sd/-
Harry Davitian, President

CC : Sunil Tyagi, Kohli Chambers of Law
David Robbins, Esq., Reid & Priest
TAPCO Board of Directors.

20 Immediately on receipt of reply Ex. P-4 dated 06.01.1995 from defendant No. 1, the plaintiff company wrote back to defendant No. 1 a letter dated 05.02.1995 which is Ex. PW-1/19 and the same reads as under:-

BY FAX: 516-0751-2914

DATED: 05-02-1995

Mr.Harry Davitian,
President,
The Asian Power Company Ltd.,
Suit 715, 1111 - 14th Street,
NW. WASHINGTON DC 20005

REG : Your Letter of 06-0195 in reply to

the Legal Notice, dated 07-12-1994
addressed to you by my Attorney
Mr.Sunil Tyagi

Dear Mr. Davitian,

I had made known that the details being sought by you vide your Fax message ibid, have been furnished on many occasions, and also vide letter of 05 Nov. 94, faxed on same date. I had also made it clear that copies of the originals are available with my Attorneys for inspection.

However, I am deeply disappointed to again bring to your notice that despite your specific assurance that the matter would be resolved at the earliest and the payments be made therewith, no action has been initiated in this regard.

I would request you to kindly treat this letter on a priority and most urgent basis under intimation to me. I need not emphasise that in the circumstances of the matter being delayed any longer, I shall be constrained to initiate appropriate legal proceedings, as detailed in the above mentioned legal notice, which shall be obviously at your risk and cost.

This letter is without prejudice to the Legal Notice, dated 07-12-94.

Yours sincerely,

Sd/-
CD H.S. GUJRAL IN (Retd)

21 A perusal of the above referred documents Ex. PW-1/6,

Ex. P-4 and Ex. PW-1/19 would clearly show that defendant No. 1 at no point of time had refuted the claim of the plaintiff company that it had worked for defendant No. 1 till at least up to December, 1994. It is generally believed that a man can lie but not the circumstances. From the oral and documentary evidence produced by the parties on record, this Court is convinced that the plaintiff company had worked for defendant No. 1 company as its 'observer/consultant' at least up to December, 1994 and therefore the plaintiff company is held entitled to recover retainership fee @ 2,250 US Dollars per month from defendant No. 1 company for a total period of 28 months starting from 01.09.1992 till 31.12.1994. The entitlement of the plaintiff on account of retainership fee calculated @ 2,250 US Dollars for a period of 28 months comes to 63,000 US Dollars equivalent to Rs. 19,65,600/- applying the conversion rate of Rs. 31.20 paise per US $ at the time of institution of suit filed in the year 1995. This issue is accordingly decided in favour of the plaintiff and against defendant No. 1.

ISSUE NO. 6

22 The plaintiff has claimed interest on the arrears of

retainership fee @ 2% per month agreed to be paid by defendant No. 1 at the time of entering into the consultancy agreement vide letter Ex. P-2 dated 14.11.1992. The interest claimed @ 2% per month appears to be on higher side and considering the facts and circumstances of the case, this Court is of the view that the interest of justice shall be adequately met by awarding the interest on the arrears of retainership fee @ 12% per annum simple instead of 2 % per month claimed in the suit. This issue is also decided accordingly in favour of the plaintiff and against defendant No. 1.

RELIEF

23 In view of my findings on the above issues, a decree of Rs. 19,65,600/- with proportionate costs and interest @ 12% per annum to be worked for the period from 01.01.1995 onwards till realisation is hereby passed in favour of the plaintiff and against defendant No. 1. The suit of the plaintiff against defendants No. 2 & 3 is dismissed as not pressed. Decree sheet be prepared accordingly.

September 07, 2007
S.N.AGGARWAL

a **[JUDGE]**